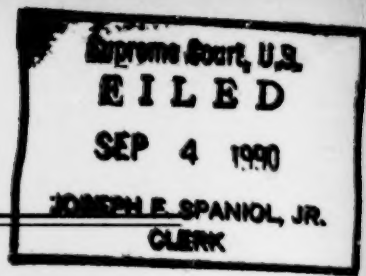


90-514



No. _____

In the
Supreme Court of the United States
October Term, 1990

ONAN CORPORATION,
a Delaware corporation,

Petitioner,

vs.

INDUSTRIAL STEEL CONTAINER COMPANY,
a Minnesota corporation,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Comprehensive Environmental Response, Compensation and Liability Act, which provides that persons responsible for releasing hazardous wastes into the environment shall be liable for the costs of environmental clean-up, "[n]otwithstanding any other provision or rule of law," preempt state law limiting the capacity of a dissolved corporation to be sued?

6205H



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PETITION FOR WRIT OF CERTIORARI

Petitioner Onan Corporation ("Onan")
respectfully requests this Court to issue a
Writ of Certiorari to review the opinion
and order of the United States Court of

Appeals for the Eighth Circuit dated June
5, 1990.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was filed on June 5, 1990 and is unreported. That opinion is attached hereto as Appendix ("App.") at A-1. The opinion of the United States District Court for the District of Minnesota granting respondent's motion to dismiss was dated June 21, 1989 and is unreported. That opinion is attached hereto as App. at A-6.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit affirming the district court's dismissal of petitioner's claims against the respondent was entered on June 5, 1990. Petitioner timely filed this Petition for Writ of Certiorari and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant parts of the following statutes are set forth in App. at A-18:

42 U.S.C. §§ 9601, 9607, 9613, 9622 and
Minn. Stat. § 300.59.

RULE 29.1 STATEMENT

Onan Corporation is owned by Onan Holding, Inc. and Hawker-Siddeley Overseas Investments Ltd. Onan's subsidiaries are: Onan Canada, ltd.; Onan Far East PTE., Ltd.; Onan International B.V.; Onan Power Systems, Inc.; Power Products (U.K.) Ltd.; Cummins Power Products Far East PTE., Ltd.; Ona Corporation; Newage Engineers, Inc.; Newage Int'l, Ltd.; Onan FSC Ltd.; Onan New England, Inc.; Dunlite Power Generation Pty. Ltd.

STATEMENT OF THE CASE

This case presents the issue of a dissolved corporation's capacity to be sued under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") and whether CERCLA preempts state law that would otherwise render a dissolved corporation immune from liability for hazardous waste clean-up. Onan Corporation commenced this action against respondent, Industrial Steel Container Company ("Industrial Steel"), to recover costs incurred in connection with the clean-up of a hazardous waste site located in Andover, Minnesota (the "Waste Disposal Engineering" or "WDE" site), a clean-up necessitated at least in part by Industrial Steel's disposal of hazardous wastes at the site. The WDE site is listed on the National Priorities List and the State List of Permanent Priorities.

The Andover landfill first opened in 1963. In 1968, Waste Disposal Engineering ("WDE") purchased the landfill, and a related company, Waste Control, Inc., transported waste materials to the site. A number of companies, including Onan and Industrial Steel, contracted with Waste Control, Inc. for the disposal of waste materials. In 1970, WDE applied for and received a permit to operate a hazardous waste disposal site at the landfill. The hazardous waste pit opened in 1972. The Minnesota Pollution Control Agency ("MPCA") ordered the waste pit closed effective February 1, 1974, because of a change in regulations and the high potential for groundwater pollution.

In January 1983, the Minnesota Department of Health issued a well advisory warning of contamination from the WDE hazardous waste pit. On July 26, 1983, the MPCA issued a formal Request for Information

("RFI") to Industrial Steel, pursuant to a provision of the Minnesota Environmental Response and Liability Act that authorizes the MPCA to make such requests to "[a]ny person who the agency has reason to believe is responsible for a release or threatened release [of a hazardous substance]." Minn. Stat. § 115B.17, subd. 3. The RFI sought information regarding Industrial Steel's use of Waste Control, Inc. as a disposer of hazardous waste and its use of the landfill operated by Waste Disposal Engineering.

On September 2, 1983, approximately a month and a half after receiving the RFI, Industrial Steel initiated corporate dissolution proceedings by adopting a resolution of voluntary dissolution. Industrial Steel has claimed that at the time it commenced dissolution proceedings, it had been out of business for four years.

The MPCA notified Industrial Steel on October 20, 1983 that Waste Control, Inc.

had failed to conduct any remedial action and that the MPCA was requesting the United States Environmental Protection Agency ("EPA") to undertake a remedial investigation and feasibility study to determine the cleanup alternatives for the WDE waste site. The notification letter also stated that the MPCA was taking action to secure federal funding for the cleanup efforts.

On October 28, 1983, eight days after learning that Waste Control, Inc. had failed to take remedial action and that the MPCA was seeking federal funding for the clean-up, Industrial Steel filed its certificate of voluntary dissolution.

On November 23, 1983, the MPCA notified Industrial Steel that it was a potentially responsible party with respect to the WDE waste site, and thus was potentially liable for cleanup costs. The MPCA's November 23 letter also invited Industrial Steel to attend an informational meeting to

discuss EPA-funded actions at the site. In response to this letter, George Rutman, Industrial Steel's president, represented to both the MPCA and the EPA that Industrial Steel had been "out of business for the past several years" and that the corporation was liquidated and dissolved.

In March of 1984, Onan and twelve other companies, collectively known as the SW-28 Group, entered into a stipulated settlement (the "Consent Order") with the MPCA and the EPA. Under the provisions of the Consent Order, the SW-28 Group agreed to carry out an investigation of the WDE site and comply with the administrative process for determining the nature and extent of contamination, studying possible remedial actions, and selecting and designing a remedial action plan. On March 16, 1984, the MPCA provided Industrial Steel with information relating to the SW-28 Group's settlement.

Industrial Steel refused to participate in those efforts. However, by a letter dated April 30, 1984, George Rutman admitted that Industrial Steel had done business with Waste Control, Inc. Indeed, it appears that Industrial Steel's involvement with Waste Control, Inc. was substantial. Information provided by Industrial Steel to the MPCA indicates that Industrial Steel may have disposed of as many as 89,100 gallons of waste per year in its use of Waste Control, Inc. as its hazardous waste hauler, or 891,000 gallons over the documented ten years of operation of the site. Such disposal would make Industrial Steel one of the largest generators at the site.

On July 30, 1984, the MPCA issued a Request for Response Action ("RFRA") which required Industrial Steel to provide additional information, implement a remedial investigation, conduct a feasibility study,

and implement a remedial action.

Industrial Steel responded by summarizing its dealings with Waste Control, Inc.

In late 1984 or early 1985, Industrial Steel, aware of the claims against it for cleanup costs for the WDE hazardous waste site, commenced action against its insurance carriers, seeking a declaratory judgment of insurance coverage for losses sustained in connection with clean-up at the WDE waste site. That action was ultimately resolved on January 28, 1988, when two of the insurance carriers settled with Industrial Steel, admitting coverage for claims against Industrial Steel arising from contamination from the WDE waste site.

Meanwhile, a joint investigation of the WDE waste site carried out by the EPA, the MPCA, and the SW-28 Group ultimately led to the agencies' issuance of a Record of Decision, dated December 31, 1987, defining the remedy to be implemented. In

cooperating with the EPA and the MPCA, Onan and other members of the SW-28 Group have incurred approximately \$2,000,000.00 in response costs relating to the first phase of the cleanup efforts.

The next phase of remedy design and implementation began on July 11, 1989 with the EPA's issuance of a Special Notice Letter under CERCLA § 122 triggering the commencement of negotiations toward a Consent Decree to complete the design and implementation of the remedy. During this period of negotiation, a number of the potentially responsible parties have attempted to put together a group to share the cost and carry out the remedy. As of the date of this petition, the Consent Decree negotiations with the EPA and the efforts to create a group continue. The cost of remedial action is presently estimated at \$14,700,000 and the aggregate cost is expected to exceed \$16,700,000.

Onan commenced this action on October 28, 1988, seeking contribution from Industrial Steel under CERCLA for costs incurred in connection with the clean-up of the WDE hazardous waste site. In lieu of an answer, Industrial Steel brought a motion to dismiss on the ground that Industrial Steel had filed a certificate of voluntary dissolution more than three years before the commencement of this action, and therefore, under Minnesota law, lacked capacity to be sued. The district court granted Industrial Steel's motion, rejecting Onan's argument that CERCLA preempts state law that might otherwise render a dissolved corporation immune from suit. Onan brought a timely appeal of the district court's order before the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit, in a two and a half page opinion, affirmed the district court on the basis of the reasoning set out in the district court

opinion. App. at A-2. Onan filed a timely petition for issuance of a writ of certiorari by this Court.

REASONS FOR GRANTING THE PETITION

I. Introduction: The Scope of the Hazardous Waste Problem And The Federal Solution.

CERCLA represents a federal law solution to a national problem. The importance of CERCLA for federal environmental policy can hardly be overstated. In enacting CERCLA in 1980 as a means of funding the cost of hazardous waste cleanups, Congress cited EPA statistics estimating that as many as 30,000 to 50,000 inactive and uncontrolled hazardous waste sites existed. H.R. Rep. No. 96-1016, 96th Cong. 2d Sess. 18, reprinted in 1980 U.S. Code Cong. § Ad. News 6119, 6120. Of these, between 1,200-2,000 were, at that time, believed to present a serious risk to public health. Id. In reauthorizing and amending CERCLA in 1986 to extend its coverage, Congress

described the protection of the public from hazardous substances as one of the nation's most pressing environmental problems and called CERCLA "one of this Nation's most important environmental programs designed to protect human health and the environment." H.R. Rep. No. 253, 99th Cong. 2d Sess. 59, reprinted in 1986 U.S. Code Cong. § Ad. News 2835, 2836 (cited hereinafter as "House Report"). In 1986, Congress believed that there might be as many as 10,000 hazardous waste sites across the nation in need of some form of remedial efforts. Id. at 2837. Congress estimated at that time that such efforts could ultimately cost as much as \$100 million and take decades to complete. Id. More recent estimates suggest that there may be as many as 50,000 contaminated waste sites and that the cost of cleanup of only 10,000 of these sites will be as much as several hundred billion dollars over the next fifty years.

See Ferrey, The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste, 57 Geo. Wash. L. Rev. 197, 211 (1988). The EPA has so far been able to address only the tip of the iceberg, with the National Priorities List currently listing 1,082 hazardous waste sites authorized to receive federal funding for cleanup efforts. 40 C.F.R. 300. This listing includes the WDE site.

In addition to authorizing the use of "Superfund" monies to finance hazardous waste cleanup activities, Congress sought to encourage cooperation from the private sector by providing companies that pay more than their share of cleanup costs with a cause of action for contribution from other responsible parties. See CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1). In this way, CERCLA expresses Congress's intent that those responsible for releasing hazardous wastes into the environment bear

the financial responsibility of environmental cleanup. Justice Brennan, in his opinion in Pennsylvania v. Union Gas Co., ____ U.S. ____, 57 U.S.L.W. 4662 (1989), emphasized these broad remedial purposes of CERCLA as follows:

The remedy that Congress felt it needed in CERCLA is sweeping: everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the cost of cleanup. See, e.g., 42 U.S.C. § 9613(f)(1) (1986 ed., Supp. IV). Congress did not think it enough, moreover, to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites: the Government's resources being finite, it could neither pay up front for the necessary cleanups nor undertake many different projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the cost of cleanup from the other potentially responsible parties.

57 U.S.L.W. at 4667; ____ U.S. at ____

(emphasis in the original). See also

Artesian Water Co. v. Government of New

Castle County, 659 F. Supp. 1269, 1276 (D. Del. 1987) ("Wherever possible, . . . CERCLA places the ultimate financial burden of toxic waste cleanup on those responsible for creating harmful conditions.");

Chemical Waste Management v. Armstrong World Industries, 669 F. Supp. 1285, 1291 (E.D. Pa. 1987) ("A theme running throughout CERCLA's legislative history is that all parties involved in hazardous waste disposal must share the costs thereof.");

United States v. Conservation Chemical Co., 628 F. Supp. 391, 401-02 (W.D. Mo. 1985) ("[T]he Court reads the legislative history of CERCLA to impose upon the judiciary an obligation to apportion responsibility in a fair and equitable manner.")

Preemption of state laws that enable corporations to avoid environmental liability is critical to CERCLA's success. If corporations are permitted to rely on state law as a shield to avoid environmental

liability, the federal policies underlying CERCLA will be thwarted. In addition to the Eighth Circuit, three other courts have addressed the issue of CERCLA's preemption of state law relating to the legal capacity of dissolved corporations. The Ninth Circuit, like the Eighth Circuit, held in Levin Metals Corp. v. Parr-Richmond Terminal, 817 F.2d 1448 (9th Cir. 1987), that CERCLA does not preempt state law. The federal district courts in Utah and the Northern District of Illinois reached the opposite conclusion, holding that CERCLA, both by virtue of its express language and its underlying purposes, does preempt state law limiting the liability of a dissolved corporation for hazardous waste cleanup. See United States v. Sharon Steel Corp., 681 F. Supp. 1492 (D. Utah 1987); Allied Corporation v. Acme Solvents Reclaiming, Inc., No. 86-C-20377, Slip. Op. (N.D. Ill. July 6, 1990) (attached hereto as App. at

A-24). Given the significant policy interests at stake and the conflicting conclusions reached by the federal courts, the issue of a dissolved corporation's liability under CERCLA merits this Court's attention.

II. The Rule Followed By The Eighth Circuit Encourages Manipulation Of State Corporate Law To Avoid Environmental Liability.

The Eighth Circuit's decision in this case draws the blueprint for corporations who wish to avoid potential liability for the cost of hazardous waste clean-up. Polluters now need only dissolve and reincorporate to at least "start the clock running" on any potential contribution action. To the extent that corporations are able to escape liability through such a ploy, Congress's intent that polluters be forced to pay the costs associated with their actions will be frustrated.

In a similar context, the court in United States v. Mottolo, 695 F. Supp. 615

(D.N.H. 1988), refused to allow the manipulation of state corporation law to avoid environmental liability. In Mottolo, the defendant incorporated following his deposit of hazardous materials at a waste site. The court held that the act of incorporating did not exempt the defendant from liability:

[O]ne of CERCLA's expressed goals is to ensure that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created. This goal would be frustrated if the mere act of incorporation were allowed to impede the recovery of response costs, for a nonincorporated violator could avoid liability simply by changing company structure. Furthermore, the absence of explicit statutory language addressing the effect of incorporation, the Act's strict liability scheme, and the broad and encompassing categories of potentially responsible parties inevitably lead the Court to the conclusion that CERCLA places no importance on the corporate form.

695 F. Supp. at 624 (citations omitted).

In contrast to the well-reasoned analysis

of the court in Mottolo, the Eighth Circuit's interpretation of CERCLA will encourage corporations to "avoid liability simply by changing company structure."

The particular facts of this case demonstrate the dangers inherent in the Eighth Circuit's decision. In this case the responsible party has made calculated use of state law dissolution procedures for the very purpose of avoiding liability for environmental clean-up. Although Industrial Steel claims that it ceased doing business sometime in 1979, it waited four years, until after being informed of its potential liability with respect to the WDE waste site, to take the first steps toward corporate dissolution. The obvious inference is that Industrial Steel was motivated to dissolve by the likelihood that it would be held financially accountable for its use of the hazardous waste site and by its desire to escape its financial

obligations. Moreover, Industrial Steel used the corporate form to secure insurance coverage that would protect it from the financial consequences of its actions. Yet, Industrial Steel has been able to successfully contend that it lacks capacity to be sued, rendering that insurance coverage unavailable for the very purpose for which it was intended.

III. The Rule Followed By The Eighth Circuit Threatens The Future Of Hazardous Waste Cleanup Efforts By Discouraging Voluntary Private Participation.

As noted above, the problem of hazardous waste contamination is one of immense proportions. Yet, the governmental resources available to deal with this problem are sharply limited. Recognizing this, Congress stated that "Negotiated private party actions are essential to an effective program for cleanup of the nation's hazardous waste sites and it is the intent of [CERCLA] to encourage private party cleanup at all sites." House Report at 101.

To this end, Congress enacted certain provisions into CERCLA that are designed to encourage cooperation of private parties with federal cleanup efforts. First, CERCLA authorizes contribution actions by parties who voluntarily clean up hazardous waste sites to recover a proportionate amount of the cost of clean-up from other responsible parties. CERCLA § 113(f)(1); 42 U.S.C. § 9613(f)(1). Second, CERCLA provides protection against contribution actions for parties who are able to reach a voluntary settlement with the government that provides for hazardous waste clean-up. CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2).

Third, CERCLA allows the EPA to provide settling parties with a covenant not to sue concerning any liability to the United States, including future liability resulting from a release or threatened release of a hazardous substance addressed

by a remedial action. CERCLA § 122(f), 42 U.S.C. § 9622(f). The availability of a covenant not to sue depends in part on whether the remedial action will be carried out in whole or in significant part by the responsible parties themselves. CERCLA § 122(f)(4)(G) 42 U.S.C § 9622(f)(4)(G). Fourth, the EPA can enter into a consent decree allowing the potentially responsible parties to carry out the response action usually at a cost substantially less than that incurred in a government conducted cleanup. CERCLA § 122(a), 42 U.S.C. § 9622(a).

The "carrots" of contribution protection, covenants not to sue and private party cleanup, must be incorporated in a consent decree approved by the Attorney General of the United States and entered in the appropriate United States District Court. CERCLA § 122(d)(1)(A), 42 U.S.C. § 9622(d)(1)(A). As illustrated by the

instant case, which began with the site investigation in 1984 and is still, in August 1990, in the stage of negotiating a final consent decree incorporating these "carrots", the process is arduous and long. If the parties are diverted by actions against a single potentially responsible party to prevent the running of corporate dissolution statutes of limitations such as Minn. Stat. 300.59, the cleanup process would be delayed until the contribution liability of each and every PRP is determined in an action in Federal District Court. The "carrot" of contribution protection would no longer have meaning. The cooperation necessary to negotiate a consent decree would be lost. Even though the government has its enforcement powers under CERCLA § 106, the potential loss of a major contributor to a hazardous waste site would force the other parties to detour the process through a lengthy and unnecessary contribution action.

In authorizing private contribution actions, Congress stated:

The section should encourage private party settlements and cleanups. Parties who settle for all or part of a cleanup or its costs, or who pay judgments as a result of litigation, can attempt to recover their portion of their expenses and obligations in contribution litigation from parties who were not sued in the enforcement action or are not parties to the settlement. Private parties may be more willing to assume the financial responsibility for some or all of the cleanup if they are assured that they can seek contribution from others.

House Report at 80. The Eighth Circuit's decision forces parties to seek contribution prematurely where a major contributor seeks to use state dissolution law to avoid liability before the lengthy negotiation and cleanup process can be completed, thereby undermining hazardous waste site cleanup.

IV. Certiorari Should Be Granted To Review The Eighth Circuit's Erroneous Holding That CERCLA Does Not Preempt State Law Rendering A Dissolved Corporation Immune From Suit.

The Supremacy Clause of Article VI of the Constitution invalidates any state laws that "interfere with, or are contrary to" federal law. Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712 (1985); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824). As this Court stated in Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), "Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." 463 U.S. at 95 (citing Jones v. Rath Packing Co., 430 U.S. 519, 524 (1977)); accord Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 152-53 (1982). The touchstone of the Court's analysis is Congress' intent.

Metropolitan Life Ins. Co. v.

Massachusetts, 471 U.S. 724, 738 (1985).

When a federal statute unambiguously precludes certain types of state legislation, as CERCLA does, the Court need look no further than the statutory language to find preemption. Exxon Corp. v. Hunt, 475 U.S. 355, 362 (1986); Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7, 12 (1983). However, in dismissing Onan's claims against Industrial Steel, based on state law regarding the capacity of dissolved corporations, neither the district court nor the Eighth Circuit made any mention of the plain language of CERCLA, which expressly preempts any state law that would otherwise limit liability for hazardous waste clean-up. Here both the district court and the Eighth Circuit overlooked the best evidence of Congress' intent to preempt any state law that might act to limit environmental liability.

CERCLA expressly provides for preemption of any inconsistent law that would limit the financial responsibility of a party liable for the costs of environmental clean-up. That statute provides, in relevant part:

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -

* * *

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances,

* * *

shall be liable for

* * *

(B) any other necessary costs of response incurred by any other

person consistent with
the national contingency
plan.

42 U.S.C. § 9607(a) (emphasis supplied).

The very first phrase of this section, which imposes liability under CERCLA "[n]otwithstanding any other provision or rule of law," unambiguously demonstrates Congress's intent that CERCLA preempt any state law that would bar action against any party that could otherwise fall within its provisions. Minnesota Statute § 300.59, the state law relied on by respondent as the basis for its lack of capacity defense, which limits the capacity of dissolved corporations to be sued, clearly limits the reach of CERCLA, and is therefore expressly preempted.

CERCLA, consistent with its broad remedial purpose, defines "person" very broadly as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United

States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21). Unlike the Sherman Act, which defines a "person" to include "corporations and associations existing under or authorized by the laws of any state," 15 U.S.C. § 7, CERCLA does not distinguish between existing and dissolved corporations. CERCLA specifically does not rely on state recognition of corporate existence for its application. Indeed, a "person" under CERCLA expressly includes unincorporated "commercial entit[ies]." Under this broad definition, Industrial Steel is a "covered person" under CERCLA, pursuant to 42 U.S.C. § 9607(a). As a covered person, Industrial Steel is liable for cleanup costs notwithstanding any other provision or rule of law.

Moreover, under the circumstances of this case, or any case where a dissolved corporation might be held liable for costs

of environmental clean-up, there arises a direct conflict between federal and state law. In the face of such a direct conflict, state law must give way to federal. See Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); Hines v. Davidowitz, 312 U.S. 52, 67 (1941). CERCLA provides its own statute of limitations for the commencement of contribution actions for recovery of cleanup costs. Pursuant to CERCLA § 113(g)(3):

No action for contribution for any response costs or damages may be commenced more than three years after --

- (A) the date of judgment in any action under this chapter for recovery of such costs or damages; or
- (B) the date of any administrative order under Section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613(g)(3).

Under this provision, which was added to CERCLA as part of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. 99-499, § 113, 100 Stat. 1647, Onan's action is timely. At the time Onan commenced this action, the SW-28 Group had not yet reached a final settlement with the EPA and the MPCA with respect to the cleanup phase of the project, nor had any administrative or judicial order been entered concerning the parties' liability for cleanup costs. Accordingly, the limitations period provided for by CERCLA for Onan's contribution action against Industrial Steel had not yet even begun to run.

The state law corporate dissolution statute operates as a de facto statute of limitations for CERCLA actions against dissolved corporations. This Court has, in other contexts, declined to apply state statutes of limitations where application of the state limitations period would

interfere with federally created rights. See, e.g., Del Costello v. International Bhd. of Teamsters, 462 U.S. 151, 161 (1983); Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977). The interference with Onan's right under CERCLA to recover environmental cleanup costs is no less here. Even before the enactment of CERCLA's statute of limitations, as part of SARA, lower federal courts had held state statutes of limitations inapplicable to actions under CERCLA. United States v. Moore, 703 F. Supp. 455, 457 (E.D. Va. 1988); Merry v. Westinghouse, 684 F. Supp. 852, 857 (M.D. Pa. 1988); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985). In this case, the Eighth Circuit has approved the application of a different state law limitations period to actions against dissolved corporations, which is in direct conflict with federal law. The state law limiting the period in which a

dissolved corporation must be sued is therefore preempted.

CONCLUSION

On the basis of the foregoing arguments and authorities, Onan respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted this 31st day of August, 1990.

GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.

Counsel for Petitioner

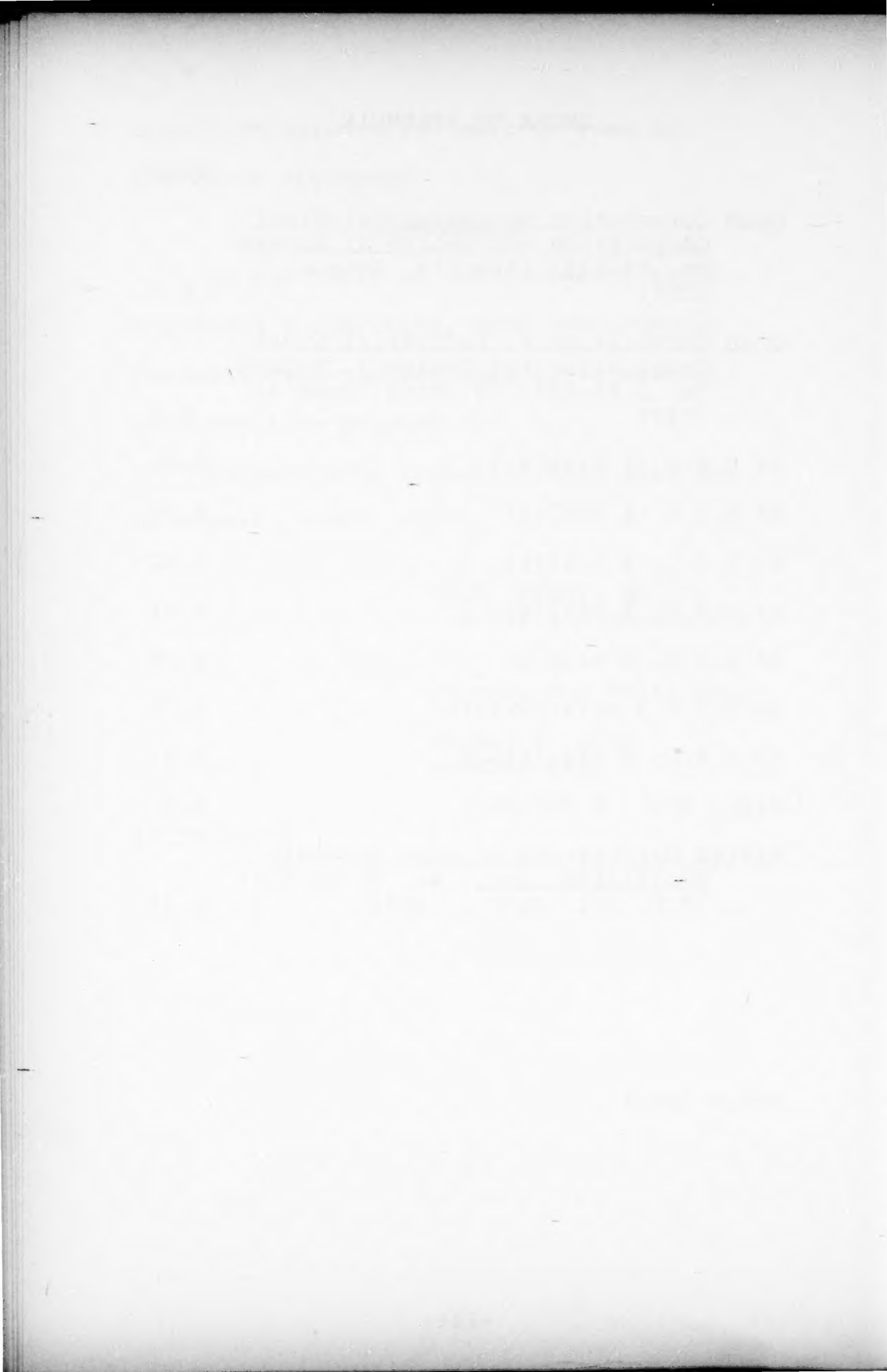
MACLAY R. HYDE
GREGORY MERZ

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6022H/7687f



UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 89-5387

Onan Corporation, a	*	
Delaware Corporation,	*	
	*	
Appellant,	*	
	*	Appeal from the
v.	*	United States
	*	District Court
Industrial Steel	*	for the District
Corporation, a Minnesota	*	of Minnesota.
Corporation, George J.	*	(UNPUBLISHED)
Rutman,	*	
	*	
Appellees.	*	

Submitted: May 17, 1990

Filed: June 5, 1990

Before LAY, Chief Judge HENLEY, Senior
Circuit Judge, and BOWMAN, Circuit Judge.

PER CURIAM.

Industrial Steel Corporation
(Industrial) was a Minnesota corporation
engaged in the business of manufacturing
and reconditioning steel containers for
many years prior to 1979. In 1979,
Industrial ceased operations and sold its

physical assets. On October 28, 1983, George J. Rutman, Industrial's trustee in dissolution, filed a certificate of voluntary dissolution with the Minnesota Secretary of State.

Under Minnesota law, a corporation retains the capacity to prosecute and defend actions for a period of three years after formal dissolution. Minn. Stat. § 300.59 (1988). On October 28, 1988 -- two years after Industrial's survival period had expired -- Onan Corporation (Onan) brought this action against Industrial, and against Rutman as trustee and shareholder. The complaint alleged that Industrial was liable to Onan for contribution under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9657 (1982), and under state law. Onan and twelve other companies (Collectively known as the "SW-28" Group")

had earlier entered into a consent decree with the Minnesota Pollution Control Agency and the Environmental Protection Agency to fund the cleanup of a hazardous waste dump site in Andover, Minnesota, and Onan now claims that Industrial, as a former user of the site, is responsible for a share of the costs.

The district court¹ dismissed the complaint on the ground that Industrial's capacity to be sued had expired under Minn. Stat. § 300.59. Onan Corp. v. Industrial Corp., Civil File No. 3-88-0877 (D. Minn. June 21, 1989). On appeal, Onan argues that (1) CERCLA preempts Minnesota law on a corporation's capacity to be sued, (2) Industrial's dissolution was ineffective as a matter of state law because Industrial failed to set aside assets to satisfy its

¹The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

potential liability for the Andover site, and (3) this court should remand so that the complaint can be amended to include claims against Rutman in his individual capacity and against Industrial's former shareholder, Stavoco Industries, Inc.

As to the first two issues, we affirm on the basis of Judge Magnuson's opinion. See also United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 746 (9th Cir. 1986) (capacity of corporation to be sued under CERCLA governed by law under which it is organized as mandated by Fed. R. Civ. P. 17(b)), cert. denied, 484 U.S. 848 (1987).

We also deny Onan's request for a remand to amend the complaint. Onan filed its motion to amend while the motion to dismiss was pending before the district court, and then sent a letter to Judge Magnuson asking that a hearing on the motion to amend be postponed until after

his ruling on the motion to dismiss. Once the district court dismissed the suit and Onan appealed, nothing remained to be adjudicated. Thus, Onan is precluded from claiming that the district court erred in dismissing the suit without considering the proposed amendments.

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

6630H

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 89-5387

Onan Corporation, a
Delaware Corporation,

Appellant,

v.

Industrial Steel
Corporation, a Minnesota
Corporation, George J.
Rutman,

Appellees.

* Civil File
* No. 3-88-0877
*

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* **MEMORANDUM AND**
* **ORDER**
*

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*

Maclay R. Hyde, Esq., Nancy A.
Quattlebaum, Esq., Gregory Merz, Esq.,
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Assistant Attorney General for the
State of Minnesota, 520 Lafayette
Road, Suite 200, St. Paul, MN 55155,
filed an amicus memorandum on behalf
of the Minnesota Pollution Control
Agency.

This matter is before the court on the
motions of defendants Industrial Steel

Corporation (Industrial Steel) and George J. Rutman to dismiss this action in its entirety. For the reasons set forth below the court grants defendants' motions.

Factual Background

Prior to 1979 Industrial Steel was a Minnesota corporation that manufactured steel drums and reconditioned used drums in St. Paul, Minnesota. George J. Rutman was the president, treasurer and member of the board of directors of Industrial Steel. The corporation closed its manufacturing operations in 1978 and ceased occupying the plant site in 1979. Industrial Steel also sold its physical assets and conducted no business after 1979.

Plaintiff Onan Corporation (Onan) commenced this action against Rutman and Industrial Steel in order to recover a share of the costs relating to the cleanup of a hazardous waste site located in Andover, Minnesota. Onan has borne these

costs as a result of entering into a consent order with the Environmental Protection Agency (EPA) and the Minnesota Pollution Control Agency (MPCA). Several other companies have entered into the consent order as well (collectively the settling parties). Industrial Steel and a number of other companies allegedly involved with the Andover site (the non-settling parties) have refused to join in the consent decree.

The Andover site is a landfill that operated in 1963. Waste Disposal Engineering (WDE) purchased the landfill in 1968 and Waste Control, Incorporated (Waste Control), a related company, began transporting waste materials to the site at that time. Over fifty companies, including Onan and Industrial Steel, contracted with Waste Control for the disposal of waste materials. WDE received a permit to open a hazardous waste disposal site at the

landfill and opened a hazardous waste pit there in November, 1972.

In January of 1983 the Minnesota Department of Health issued a well advisory due to contamination from the Andover hazardous waste pit. The MPCA issued a formal Request for Information (RFI) to Industrial Steel on January 26, 1983. In the RFI the MPCA sought information regarding Industrial Steel's dealings with Waste Control and the landfill owned by WDE. On September 2, 1983, Industrial Steel adopted a resolution of voluntary dissolution. Rutman, who was designated as the trustee in dissolution of the company, filed a formal certificate of voluntary dissolution with the Minnesota Secretary of State on October 28, 1983. In the meantime, on October 20, Industrial Steel had received a letter from the MPCA informing Industrial Steel that WDE had failed to take remedial action at the

Andover site and that both the EPA and the MPCA would be investigating the matter.

On November 23, 1983, the MPCA notified Industrial Steel that the MPCA considered Industrial Steel to be a potentially responsible person with respect to cleanup costs at the Andover waste site. Rutman responded in a letter that Industrial Steel had been out of business for several years and that the company had been dissolved. On March 16, 1984, the MPCA sent Industrial Steel a copy of the consent order which had been negotiated and lists of both the settling and non-settling parties. Although Industrial Steel refused to sign the consent order, the company complied with the MPCA's request for responsive action and provided the MPCA with a summary of its dealings with Waste Control. Industrial Steel fashioned its response from information provided by Hyman Simes and Jerry Berke, former Industrial Steel employees.

In December of 1984 Industrial Steel, aware of possible claims against it for cleanup costs, instituted an action against one of its insurance carriers. A month later, Industrial Steel added two other insurance companies to the suit. Industrial Steel sued the insurance carriers to obtain a declaratory judgment of the insurers' duties under the policies previously in force. The Ramsey County District Court granted summary judgment for Industrial Steel, and the insurers appealed. The Minnesota Court of Appeals affirmed in part but reversed the grant of summary judgment, remanding the case to the district court. See Industrial Steel Container v. Fireman's Fund, 399 N.W.2d 156 (Minn. Ct. App. 1987). Before any further proceedings could take place one of the insurers notified Industrial Steel that it was insolvent, and the other two admitted coverage for claims arising from contamination at the Andover waste site.

Onan filed the instant action on October 28, 1988. The complaint alleges five counts against Industrial Steel, two counts against Rutman and requests the court to appoint a receiver for the undistributed assets of Industrial Steel. The law suit is essentially a contribution action based on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq., and the Minnesota Environmental Response and Liability Act (MERLA), Minn. Stat. § 115B.03. Defendants move for dismissal of the action on the grounds that under Minnesota law Industrial Steel has no capacity to be sued beyond the three-year period following the date on which the company filed its certificate of voluntary dissolution. Rutman contends that his capacity to be sued as a trustee or shareholder of Industrial Steel is also subject to the three-year limitation. Thus

defendants contend that the action must be dismissed in its entirety.

Analysis

For purposes of a motion to dismiss the court must accept the factual allegations of the complaint as true. The complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Conley v. Gibson, 355 U.S. 41, 45-46

(1957). In this motion the only disputed issue of law is whether the defendants had the capacity to be sued at the time Onan filed this action.

Fed. R. Civ. P. 17(b), which governs an entity's capacity to sue or be sued in federal court, provides that "[t]he capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Rule 17(b) is a codification of the basic principle of the

law of corporations recognized by Chief Justice Taft in Oklahoma Natural Gas Co. v. State of Oklahoma, 273 U.S. 257, 259-60 (1927):

[C]orporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. The matter is not really procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being.

The Supreme Court reaffirmed Chief Justice Taft's statement of the law in Chicago Title & Trust Co. v. Forty-one Thirty-six Wilcox Bldg. Corp., 302 U.S. 120 (1937).

In that case an Illinois corporation which had been dissolved for four years filed a petition for reorganization under the United States bankruptcy laws. The Court refused to allow the corporation to maintain its action because under Illinois

law the corporation no longer had the capacity to sue. The Illinois statute governing corporate dissolutions authorized actions for only two years following dissolution. The court foreclosed any further action by the dissolved corporation, stating:

The decisions of this court are all to the effect that a private corporation in this country can exist only under the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person.

Id. at 124-25.

Minnesota law with respect to the capacity of a dissolved corporation to sue or be sued is similar to the provisions at issue in Chicago Title. Minn. Stat.

§ 301.56 (1982), the statute

When a corporation has been completely wound up...the trustee or trustees shall sign and acknowledge a certificate stating that the corporation has been completely wound up and is dissolved.

The...certificate of dissolution shall be filed for record with the secretary of state and thereupon the corporate existence shall terminate.

The corporate survival provision is set forth in Minn. Stat. § 300.59:

[A] corporation whose existence terminates by limitation, forfeiture, or otherwise continues for three years after the termination date for the sole purpose of prosecuting and defending actions, closing its affairs, disposing of its property, and dividing its capital.

These statutory provisions modify the common law rule that a corporation ceases to exist for any purpose at the time of dissolution. "To obviate this harsh rule the legislature enacted the predecessor to section 300.59 which extended the life of a dissolved corporation for a specific term." Mattson v. Underwriters at Lloyds of London, 385 N.W.2d 854, 857 (Minn. Ct. App. 1986) (citations omitted). Balanced against the legislature's concern for the problem of corporations dissolving in order

to avoid liability is the need to allow corporations to die a natural death.

"[T]he purpose of both the common law rule and the survival statutes is to provide a definite point in time at which the existence of a corporation and the transaction of its business would be terminated...." Id. at 858. The Minnesota Supreme Court has acknowledged that a corporation in voluntary dissolution may be sued only within the statutory three-year period. See *Mississippi Valley Development Corp. v. Colonial Enterprises, Inc.*, 300 Minn. 66, 217 N.W.2d 760 (1974); *Kopio's Inc. v. Bridgeman Creameries*, 248 Minn. 348, 79 N.W.2d 921 (1957).

In this case Industrial Steel filed a certificate of voluntary dissolution on October 28, 1983, and openly disclosed this fact to both the MPCA and the EPA in December of 1983. Onan did not initiate this law suit until October 28, 1988, a

full five years after Industrial Steel formally dissolved. This action clearly falls outside of the three-year survival period. Therefore, Onan has attempted to sue a corporation that was no longer in existence.

Onan contends that even though the three-year period has run, Industrial Steel may be sued because both CERCLA and MERLA preempt any state law inconsistent with the underlying purpose of CERCLA and MERLA, that is, to hold responsible parties liable for hazardous wastes. Onan argues that if Industrial Steel attempts to use Minn. Stat. § 300.59 as a shield to protect itself from CERCLA and MERLA liability, then § 300.59 is inconsistent with the purposes of CERCLA and MERLA. Therefore, Industrial Steel's dissolution should be ineffective.

This court is aware of the threat to health and safety caused by hazardous

wastes in our society and the need for strong measures to attack this problem. In United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982), this court stated, "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created. To give effect to these congressional concerns, CERCLA should be given a broad and liberal construction." Nevertheless, the reach of CERCLA is not unlimited.

This case highlights the clash of two important policy concerns. On the one hand, CERCLA must be construed liberally in order to deal effectively with the problem of hazardous wastes. On the other hand, the life of a corporation may not be extended indefinitely. A corporation that follows the statutorily defined procedures

for dissolution and termination should, in the absence of fraud, be able to rely on the promise of Minn. Stat. § 300.59 that the corporation will cease to exist for all purposes after three years.

In two cases the federal courts have addressed the conflict between CERCLA and state statutes regarding capacity to be sued, and the two courts involved have taken opposite positions. In Levin Metals Corp. v. Parr-Richmond Terminal Co., 631 F. Supp. 303 (N.D. Cal. 1986), aff'd, 817 F.2d 1448 (9th Cir. 1987), the plaintiff brought a CERCLA action against a dissolved corporation. The district court dismissed the action on the grounds that California law did not authorize suits against dissolved corporations for causes of action arising subsequent to dissolution. 631 F. Supp. at 304. The Court of Appeals for the Ninth Circuit affirmed and held that the capacity of a dissolved corporation to be

sued is governed by Rule 17(b). The court rejected the plaintiff's contention that CERCLA preempts state law on capacity to be sued. 817 F.2d at 1451.

The other case, U.S. v. Sharon Steel Corp., 681 F. Supp. 1492 (D. Utah 1987), involved a CERCLA action brought against a corporation that had lost the capacity to be sued under Main law four years earlier. The court disagreed with the Court of Appeals for the Ninth Circuit and ruled that "CERCLA overrides Rule 17(b) and the applicable state law, whatever that law might be." Id. at 1495.

The Court of Appeals for the Eighth Circuit has ruled on this issue only indirectly. In United States v. Northeastern Pharmaceutical & Chemical Co., 579 F. Supp. 823 (W. D. Mo. 1984), aff'd in part, 810 F.2d 726 (8th Cir. 1986) cert. denied, 108 S. Ct. 146 (1987), the United States brought a CERCLA action against a

corporate defendant which had forfeited its charter, but had not filed the certificate of voluntary dissolution required by Delaware law. The district court found that "a corporation with a forfeited charter is not completely dead for all purposes, but merely in 'a state of coma,' during which it is still subject to suit, even if the suit is brought more than three years after the charter forfeiture." 579 F. Supp. at 828 n.1. As a result, the district court held the corporation liable. The court of appeals agreed, stating that "forfeiture of the corporate charter and voluntary dissolution of the corporation are not legally equivalent." 810 F.2d at 746. The court also affirmed the district court's conclusion that in a CERCLA action "[t]he capacity of a corporation to sue or be sued is determined by the law under which it is organized." Id. (citing Fed. R. Civ. P. 17(b)).

The case at hand is slightly different from Northeastern because following Rule 17(b) in this case would defeat liability for Industrial Steel. However, the Eighth Circuit placed no limitations on its conclusion that Rule 17(b) applies to CERCLA cases. Moreover, the holding of Northeastern that voluntary dissolution is qualitatively different from forfeiture of charter implies that dissolution, followed by the three-year survival period, terminates the corporation's comatose condition and renders the corporation legally dead. Not even the important policy goals underlying CERCLA can resurrect Industrial Steel. For the same reasons, Onan's argument with respect to MERLA must fail as well.

Onan argues in the alternative that Industrial Steel's dissolution was ineffective. Onan contends that Industrial Steel was aware of its potential liability

for cleanup of the Andover site but failed to make provisions for the payment of this "debt." According to Onan, such action does not satisfy the statutory requirements for dissolution set forth in Minn. Stat. § 301.48, which was in force when Industrial Steel attempted to dissolve. Onan cites the dissent of Justice Yetka in Mattson v. Underwriters at Lloyds of London, 414 N.W.2d 717 (Minn. 1987), for the proposition that a corporation may not undertake voluntary dissolution in order to avoid liability and that any such dissolution is ineffective.

The court notes that the majority in Mattson did not reach this issue. However, it is true that dissolution cannot serve as clandestine substitute for bankruptcy. Justice Yetka's dissent succinctly states the potential problem: "Plaintiffs' attorney maintains that Lloyds of London encouraged Car-Del to dissolve quietly and

secretly so that, unknown to plaintiffs, the 3-year statute would bar plaintiffs from collecting the deficiency judgment against Car-Del and, therefore, bar Car-Del's claim against Lloyds of London." Id. at 722 (Justice Yetka dissenting). In contrast, Industrial Steel dissolved openly, disclosing its dissolution to both the EPA and the MPCA. The company had been out of business for a number of years and had not good reason not to dissolve. Onan's contention that Industrial Steel failed to provide for its debts is also without merit. The potential claims against Industrial Steel were not outstanding debts at the time of the company's dissolution. Moreover, Industrial Steel took steps to secure insurance coverage for claims relating to the Andover site by suing its insurers. If an action had been brought against Industrial Steel within the three-year

period, the company could have met its obligations, at least in part. Having concluded that Industrial Steel followed the statutory requirements for dissolution, the court will not find the dissolution ineffective.

Onan's final argument is that even if Industrial Steel lacks the capacity to be sued, George Rutman may be held personally liable. Onan's claim against Rutman is based on two separate theories. First, Onan asserts that Rutman may be liable as trustee for any undistributed corporate assets. Second, Onan claims that Rutman may be liable as a shareholder who received corporate assets properly payable to Onan. Onan has not sued Rutman in his individual capacity.

Onan's action against Rutman as trustee must fail because Rutman no longer has the capacity to be sued. This conclusion is compelled by the Minnesota

Supreme Court's decision in Henderson v.

Northwestern Heating Engineers, Inc., 274

Minn. 396, 144 N.W.2d 46 (1966). The court stated:

Since one of the duties of the trustee enumerated in § 301.52 is to defend the corporation against claims, it must follow that his capacity as trustee will continue so long as the corporation can be legally subjected to claims. Since under § 300.59 the corporation's existence continues for 3 years after the filing of the certificate for the purpose of defending actions, it must of necessity follow that the trustee will remain a trustee for the 3-year period.

144 N.W. 2d at 48. See also Mattson, 385

N.W.2d at 857 (quoting Henderson with

approval). In this case Rutman's capacity

to be sued as trustee terminated on October

28, 1986, at the same time Industrial Steel

lost the capacity to be sued.

Finally, Onan's action against Rutman for shareholder liability is fatally

flawed. Rutman asserts that he never owned

shares of Industrial Steel and that another

company owned all of the stock of Industrial Steel. In addition, Onan's claim is based on Minn. Stat. § 300.64, which holds a shareholder liable "[i]f the capital stock of a manufacturing corporation is withdrawn and refunded to the stockholders before the payment of corporate debts for which it would have been liable...." If the corporation is not liable for the alleged debt, then the shareholder is not liable either.

Industrial Steel cannot be sued for any reason beyond the three-year period following dissolution, regardless of whether any distributed or undistributed assets exist. Onan cannot circumvent this rule and achieve the desired result indirectly by suing a shareholder.

Accordingly, IT IS ORDERED that:

1. Industrial Steel's motion to dismiss Onan's action in its entirety shall be, and hereby is, GRANTED.

2. George J. Rutman's motion to
dismiss Onan's action in its
entirety shall be, and hereby is,
GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 21, 1989.

/s/

Paul A. Magnuson
United States District Judge

6635H

§ 9601. Definition

For purpose of this subchapter --

(21) The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

§ 9607. Liability

- (a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts

recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

§ 9613. Civil proceedings

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or

judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this

paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced --

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the

response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after --

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

§ 9622. Settlements

(a) Authority to enter into agreements

The President, in his discretion, may enter into an agreement with any person (including the owner or operator of the facility from which a release or substantial threat of release emanates, or any other potentially responsible person), to perform any response action (including any action described in section 9604(b) of this title) if the President determines,

that such action will be done properly by such person. Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation. If the President decides not to use the procedures in this section, the President shall notify in writing potentially responsible parties at the facility of such decision and the reasons why use of the procedures is inappropriate. A decision of the President to use or not to use the procedures in this section is not subject to judicial review.

(d) Enforcement

(1) Cleanup agreements

(A) Consent Decree

Whenever the President enters into an agreement under this section with any potentially responsible party with respect to remedial action under section 9606 of this title, following approval of the agreement by the Attorney General, except as otherwise provided in the case of certain administrative settlements referred to in subsection (g) of this section, the agreement shall be entered in the appropriate United States district court as a consent decree. The President need not make any finding regarding an imminent and substantial endangerment to the public health or the environment in connection with any such agreement or consent decree.

(f) Covenant not to sue

(1) Discretionary covenants

The President may, in his discretion, provide any person with a covenant not to sue concerning any liability to the United States under this chapter, including future liability, resulting from a release or threatened release of a hazardous substance addressed by a remedial action, whether that action is onsite or offsite, if each of the following conditions is met:

(A) The covenant not to sue is in the public interest.

(B) The covenant not to sue would expedite response action consistent with the National Contingency Plan under section 9605 of this title.

(C) The person is in full compliance with a consent decree under section 9606 of this title (including a consent decree entered into in accordance with this section) for response to the release or threatened release concerned.

(D) The response action has been approved by the President.

Minn. Stat. § 300.59. Continuance to close affairs' exceptions

Except for a corporation subject to the Minnesota Nonprofit Corporation Act, a

corporation whose existence terminates by limitation, forfeiture, or otherwise continues for three years after the termination date for the sole purpose of prosecuting and defending actions, closing its affairs, disposing of its property, and dividing its capital.

6659H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

ALLIED CORPORATION,)	
<u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	86 C 20377
)	
ACME SOLVENTS RECLAIMING,)	
INC., <u>et al.</u> ,)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

This action comes before the Court on defendant Rolisa Corporation's objections to the Report and Recommendation of Magistrate P. Michael Mahoney denying Rolisa Corporation's motion for summary judgment. For the reasons set forth in the opinion below, this Court adopts the holding but not the reasoning of the Magistrate's Report and Recommendation and denies Rolisa Corporation's motion for summary judgment.

I. BACKGROUND

As stated in the Magistrate's Report and Recommendation, the relevant undisputed facts are as follows:

Matherson-Selig Co. was organized as an Illinois corporation on April 29, 1947 (Def. Ex. A.). In March 1978, Matherson-Selig sold some of its assets, including use of the name "Matherson-Selig ", to Colwell General, Inc. (Pl. Response, p. 3). Matherson-Selig Co. changed its name to Rolisa Corp. on September 1, 1978 (Def. Ex. B). Plaintiffs allege that Metherson-Selig generated solvent waste which Acme Solvents disposed of at the Acme site from (sic) the early 1960's until at least 1973 (Pl. Response, p. 3). On September 19, 1984, Rolisa Corp. was voluntarily dissolved (Def. Ex. D). All of Rolisa's assets were distributed during September 1984 to its two sole shareholders, Mr. Irving Finder, Rolisa's president at the time of its dissolution and his wife (Irving Finder deposition, p. 43; Pl. Ex. 6).

Magistrate's Report and Recommendation, slip op. at 2 (N.D. Ill. August 18, 1989).

In addition to the above-quoted facts from the Magistrate's Report and Recommendation, the defendant has presented

a few additional facts which are not in dispute. First, Rolisa correctly notes that the plaintiffs, as well as the defendants, including Rolisa Corporation, are "potentially responsible parties" (hereinafter "PRP's") at the Acme site under the Comprehensive Environmental Response, amended by the Superfund Amendments and Reauthorization Act of 1986 (hereinafter "SARA"), 42 U.S.C. §§ 9601-9675. Rolisa also correctly states that this action is one for indemnification (Count I of the Amended Complaint) and contribution (Count II of the Amended Complaint).

II. SUMMARY OF THE PARTIES' POSITIONS

The central issue in Rolisa's motion for summary judgment, and the central question raised in Rolisa's objections, relate to whether Rolisa, as a dissolved corporation, is capable of being sued in the

underlying CERCLA and SARA action. Defendant Rolisa Corporation's agreements with, and objections to, the Magistrate's Report and Recommendation can be summarized as follows.

Rolisa first contends that the Magistrate is correct in determining that Illinois law controls the question of Rolisa's capacity to be sued. Rolisa is also in agreement with the Magistrate that Rolisa is not subject to suit under Illinois common law and that the only potential for suit is under the Illinois Business Corporation Act's "survival" statute. Ill. Rev. Stat. ch. 32, para. 12.80. Rolisa also appears to agree with the Magistrate's conclusion that the "survival" statute of the Illinois Business Corporation Act (hereinafter "IBCA") is ambiguous and it is unclear whether the Act covers the present situation and allows suit to be brought against the now-dissolved Rolisa Corporation.

As a general proposition, however, Rolisa contends that at this point in the analysis the Magistrate's Report and Recommendation begins "mixing apples and oranges." Rolisa contends that the Magistrate's conclusion that looking to state law for guidance on interpretation of the ambiguous state statute on the one hand and attempting to construe CERCLA and SARA liberally in order to support a federal cause of action on the other hand, is illogical and flies in the face of Fed. R. Civ. P. 17(b) requiring the Court to look only to state law.

Rolisa next argues that under the IBCA a "liability" is "incurred" when a "cause of action" has "accrued," citing to Blankenship v. Demmler Manufacturing Co., 89 Ill. App. 3d 569, ____, 411 N.E.2d 1153, 1156, 44 Ill. Dec. 787, 790 (1st Dist. 1980). Rolisa also buttresses its argument citing to In Re.: Johns-Manville/Asbestos

Cases, 516 F. Supp. 375 (N.D. Ill. 1981)

for the proposition that a "party against whom indemnification or contribution is sought does not 'incur any liability' until the party seeking such indemnification or contribution has been found liable or has settled with the original claimant."

(Rolisa's Obj. to Magistrate's Report and Recommendation at 5). Rolisa finally takes issue with the Magistrate's conclusion that while in ¶ 12.75 of the IBCA the term "claim" does not include any contingent liability, the term "claim" does include contingent liabilities in the remainder of the provisions of the IBCA.

The response of the plaintiffs^{1/} covers a number of points. First,

^{1/} For purposes of the response to Rolisa's motion for summary judgment and response to Rolisa's objections to the Magistrate's Report and Recommendation, "plaintiffs" include all plaintiffs in this action except Reliance Universal which is separately represented.

plaintiffs contest Rolisa's suggestion that a "liability" can only be an obligation which has already become certain. Second, plaintiffs challenge Rolisa's assertion that in the absence of any Illinois Supreme Court determination, Blankenship, supra, controls this Court's decision. Lastly, plaintiffs contend that Blankenship is inappropriate as it deals solely with whether § 80(c) of the IBCA provided for an implied cause of action against corporate officers and whether the equitable trust fund doctrine applies where a corporation, at the time of its dissolution, could not have been aware of a plaintiff's potential claim. Plaintiffs contend that the Blankenship court did not analyze or construe any of the provisions or terms contained in the IBCA. Plaintiffs lastly contend that the obiter dicta contained in Blankenship is distinguishable because Blankenship dealt with a factual situation

where the defendants had no knowledge of the existence of any injury or liability; plaintiffs allege that in the instant case Rolisa was fully aware of the CERCLA injuries prior to the corporate dissolution and that Rolisa incurred a contingent liability from the moment CERCLA was enacted.^{2/}

III. OPINION OF THE COURT

This Court is disinclined to agree with the parties' postulate of the issue before the Court. The parties have characterized this dispute as whether Illinois law, specifically the IBCA, provides for a cause of action against a dissolved

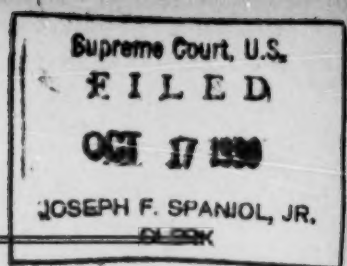
^{2/} Plaintiffs alternatively contend that at the very latest, Rolisa became aware of its liability when it was notified of the cleanup of the Acme site by the United States Environmental Protection Agency in 1983, notification that came well before the voluntary dissolution of the corporation on September 19, 1984.

corporation in the position of Rolisa Corp. This Court, however, believes that the relevant question presented is whether Congress intended CERCLA to supersede the Federal Rules of Civil Procedure, obviating the necessity to look to the Illinois law pursuant to Fed. R. Civ. P. 17(b). See United States v. Sharon Steel Corp., 681 F. Supp. 1492 (D. Utah 1987). It is this issue which this Court will address in response to Rolisa's objections to the Magistrate's Report and Recommendation and in response to Rolisa's motion for summary judgment.

The Court will not grant any summary judgment motion unless all of the pleadings and supporting documents, if any, indicate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505,

(2)

No. 90-514



In The
Supreme Court of the United States
October Term, 1990

ONAN CORPORATION,
a Delaware Corporation,

Petitioner,

v.

INDUSTRIAL STEEL CONTAINER COMPANY,
a former Minnesota corporation,

Respondent.

Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Eighth Circuit

BRIEF OF RESPONDENT
IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant certiorari to decide whether the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) preempts or alters longstanding law on corporate capacity to be sued, when there is no conflict among the circuits and the real issue in this case involves an unexplained failure to commence suit within the liberal time afforded under the applicable state survival statute following corporate dissolution?

RULE 29.1 STATEMENT

Pursuant to Supreme Court Rule 29.1, the only other company that was previously affiliated with Industrial Steel Container Company was its parent and sole shareholder, Stavoco Industries, Inc. (Stavoco), a liquidated and dissolved Minnesota corporation.

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No. 90-514

In The
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ONAN CORPORATION,
a Delaware Corporation,

Petitioner,

v.

INDUSTRIAL STEEL CONTAINER COMPANY,
a former Minnesota corporation,

Respondent.

**Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Eighth Circuit**

**BRIEF OF RESPONDENT
IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

STATEMENT OF THE CASE

Petitioner Onan Corporation (Onan) has discussed many of the central facts. A few additional matters, however, deserve mention in order that the petition may be considered and decided in proper perspective.

Industrial Steel Container Company (Industrial), a liquidated and dissolved Minnesota corporation, once manufactured new steel drums and reconditioned used empty steel drums in Saint Paul, Minnesota for many years. It closed its manufacturing and reconditioning operations in 1978, and ceased occupying its plant site in 1979. It then sold its physical assets to many buyers throughout the United States. It conducted no drum manufacturing or reconditioning operations after 1979.

On September 2, 1983, a statutory resolution of voluntary dissolution of Industrial was adopted, which was filed with the Minnesota Secretary of State pursuant to statute on September 6, 1983. On October 28, 1983, George J. Rutman (Rutman), in his capacity as the duly appointed Trustee in Dissolution of Industrial, filed the required statutory Certificate of Voluntary Dissolution with the Secretary of State. At that point, Industrial ceased to exist as a matter of law. No company succeeded to its existence. Rather, Stavoco, its sole shareholder, received the net proceeds of the dissolution. Stavoco has also since been voluntarily liquidated and dissolved.

By correspondence dated December 9 and 16, 1983, and April 27 and 30, 1984, Rutman specifically notified both the Minnesota Pollution Control Agency (MPCA) and the United States Environmental Protection Agency (EPA) of Industrial's liquidation and dissolution. That correspondence was available to petitioner on and after those dates. In addition, Industrial provided information to the MPCA regarding its hauler's use of the landfill in

question. Its disposal of waste was neither constant in volume from year to year nor was it all "hazardous".¹

It is undisputed that no claim or suit was brought against Industrial until petitioner commenced this action on October 28, 1988, precisely five years after the Certificate of Voluntary Dissolution was publicly filed with the Minnesota Secretary of State, and two years after the Minnesota statute permitting suits to be brought against dissolved corporations had expired.

SUMMARY OF THE ARGUMENT

This Court should not grant certiorari in this case, since there is no conflict to resolve. The lower court decisions fall neatly into two non-conflicting categories. In those cases where suit under CERCLA was permitted, either the corporations had not taken all steps required for effective or complete dissolution under the appropriate state statutes, or there was a demonstrably improper motive involved. Therefore, there is no conflict with the cases that prohibit suit when a corporation has fully, openly and fairly dissolved several years before suit was brought. Those decisions have carefully analyzed the federal policies underlying CERCLA, and have read the federal and state law on corporate capacity to be sued in

¹ Petitioner's claims regarding the purported "volume" and "hazard" attributable to Industrial (Pet. at 11) are disputed. It was unnecessary, of course, for the courts below to deal with the merits of these claims. Likewise, it should be noted that many large, responsible corporations are in the process of resolving the problems at the landfill in question.

harmony with CERCLA. The courts have not found preemption, and have not seen their decisions as an impermissible method to avoid liability even though suit is precluded.

In addition, the underlying issue in this case does not revolve around CERCLA preemption of the law of corporate capacity to be sued. Rather, petitioner had ample time, three years under the Minnesota survival statute, to bring suit against Industrial. Inexplicably, it did not bring a timely suit. Accordingly, there is no reason to revisit corporate capacity when the issue is something else entirely. The courts below clearly recognized this infirmity. Petitioner should not be permitted to employ a petition for certiorari to save itself from its own neglect and inaction.

ARGUMENT

I. THE CAPACITY OF A CORPORATION TO BE SUED UNDER CERCLA IS GOVERNED BY F.R.C.P. 17(b) AND STATE LAW, AND CERCLA DOES NOT PREEMPT OR OTHERWISE CHANGE THAT BODY OF LAW.

Curiously, in its lengthy petition, petitioner makes no mention whatever of F.R.C.P. 17(b) and the long line of cases, including CERCLA cases, which hold that the capacity of a corporation to be sued in the federal courts in any kind of action is determined by state law. Yet, this rationale was fundamental to the decision of the courts below, and cannot be ignored.

In determining the applicability of F.R.C.P. 17(b) and state law to CERCLA actions, the important policies underlying CERCLA can be taken into account. The District Court was fully aware of the "threat to health and safety cause by hazardous waste in our society and the need for strong measures to attack this problem." (Petitioner's Appendix at A-18-19.) Even with this in mind, the court correctly decided, and the Eighth Circuit affirmed, that F.R.C.P. 17(b) and state law are not preempted by CERCLA.

F.R.C.P. 17(b) provides in pertinent part:

The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized.

As recognized by the courts below, F.R.C.P. 17(b) is actually a codification of long-standing federal law. See *Oklahoma Natural Gas Company v. Oklahoma*, 273 U.S. 257, 259-260 (1927); *David Lupton's Sons Co. v. Automobile Club of America*, 225 U.S. 489 (1912). The leading treatise states that "(t)he principle that a corporation's capacity to sue and be sued is determined by the law of the state of its incorporation was applied in the federal courts even before the adoption of the federal rules and has been characterized as expressive of the general law", and that "the federal courts have held that the capacity of a dissolved corporation to sue and be sued is determined by the law of the state in which it was organized." 6A Wright, Miller & Kane, *Federal Practice and Procedure*, §§ 1561, 1563 (1990).

There is no evidence, as petitioner tries to argue, that the "plain language" of CERCLA expressly preempts any

and all state law of corporate capacity to be sued. The language contained in 42 U.S.C. § 9607(a) states that "(n)otwithstanding any other provision or rule of law, . . . any person . . . shall be liable" Petitioner complains that the decisions of the courts that follow F.R.C.P. 17(b) and state law limit suit, and are contrary to Congressional policy. But F.R.C.P. 17(b) and the state of law of corporate capacity can be read in complete harmony with CERCLA. The isolated phrase upon which petitioner relies can be read to mean that underlying remedies established by CERCLA are not to be modified by any preexisting law, rather than dealing with capacity to be sued. *See, e.g., Matter of Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981); *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 739 (5th Cir. 1980) (dealing with similar language in the Federal Water Pollution Control Act).

In addition, CERCLA defines "person" to include "corporation", but not a "former" or "dissolved" corporation. 42 U.S.C. § 9601(21). A dissolved corporation is simply not a "person" in the eyes of the law. It ceases to exist upon expiration of the statute of repose following dissolution. Indeed, in *United States v. Distler*, 741 F.Supp. 643 (W.D. Ky. 1990), the court did not even need to reach the preemption issue after examining the language of CERCLA. The court, while acknowledging that the definition of "person" in CERCLA was very broad, determined that the "statute is silent, however, on the liability of dissolved corporations" 741 F.Supp. at 645. The court stated that, whether or not procedurally the dissolved corporation had the capacity to be sued, the first determination to be made was whether the substantive law of CERCLA imposed liability. The court determined this to

be a case of first impression involving a question of federal law. *Id.* at 646. The court held that "[b]ecause the United States has presented no convincing authority to support its position that a corporation which has completely wound down and distributed its assets can be held liable under CERCLA," the case had to be dismissed. *Id.* at 647.

F.R.C.P. 17(b) and state law establish when a corporation has the capacity to be sued. If Congress had intended in CERCLA to preempt either body of law with respect to corporate capacity, it did not clearly communicate that intention. Indeed, in a related context regarding the ability to pierce the corporate veil and impose liability on a parent company under CERCLA, the court in *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), expressed just that sentiment regarding congressional intent. The appellants could point to little in the legislative history to allow piercing under anything but traditional principles, merely an "inherent underlying intent of Congress to hold those who profited from hazardous waste sites responsible for the cost of clean up" The court in response stated, "without an express Congressional directive to the contrary, common-law principles of corporate law . . . govern our court's analysis." 893 F.2d at 83. In fact, consistent with all of these decisions, the court would not pierce the corporate veil absent a "sham to perpetrate a fraud or avoid personal liability". *Id.* The parent was not liable for its subsidiary, even considering the broad remedial scope of CERCLA.

Nothing in F.R.C.P. 17(b) or state law is contrary to congressional policy under CERCLA. Full effect can be given to federal policies and the federal law of corporate

capacity to be sued if a party seeking relief simply sues within the permissible time.

Requiring timely commencement of suit is entirely consistent with the important policy goals of CERCLA or any other salutary remedial statutory scheme. No one can deny that CERCLA contains strong and important policies, and serves a most valuable purpose. There can be no question that it, like many other federal and state laws which have been enacted to provide solutions to problems on the basis of developing knowledge, is critically necessary. This, however, misses the mark, and conceding this point in no way changes the result reached below. Every remedial statute ever enacted to protect and promote the health and welfare of this country and its people is important in its own right. CERCLA is no exception. Nonetheless, proceedings under every important law must be brought in a timely fashion, under either a particular statute's own period of limitations or within periods of repose mandated by F.R.C.P. 17(b) and the state law of corporate capacity. In a sense, petitioner is asking the courts to hold that CERCLA is so important that it outweighs the importance of bringing suit timely, and excuses otherwise inexcusable, dilatory inaction.

This is simply not so. Bringing a claim timely, under either a statute of limitations or repose, or before a "person" ceases to be viable, is unquestionably an important policy upon which the American legal system has functioned for generations. Indeed, such statutes are looked upon with favor by this Court. *See, e.g., Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) ("Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well ordered

judicial system."); *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). It is simply axiomatic that if one has a case, the facts and statutes should be reviewed so that the case may be brought timely. Otherwise, it is barred. Important remedial statutes, therefore, can and do peacefully coexist with periods of limitation. There is no reason to change that important underpinning of our judicial system here.

II. THIS COURT DOES NOT NEED TO REVISIT THE DOCTRINE OF CORPORATE CAPACITY TO BE SUED, SINCE THE CASES DECIDED IN THE LOWER COURTS DO NOT CREATE A CONFLICT AND THE TRUE ISSUE HERE IS NOT ABOUT CAPACITY, BUT FAILURE TO ACT WITHIN THE LIBERAL TIME FRAME PROVIDED BY THE MINNESOTA CORPORATE DISSOLUTION STATUTE.

A. Decisions Involving Corporate Capacity To Be Sued Under CERCLA Are A Consistent Body Of Law.

The conflict that is said to exist among cases dealing with the issue of corporate capacity is more illusory than real. In looking at the circumstances surrounding the decisions, they can all be reconciled and read in complete harmony. Where a corporation had not perfected the dissolution or had an improper purpose in dissolving, suit under CERCLA was permitted. In other cases, suit under CERCLA was correctly prohibited.

In *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 579 F.Supp. 823 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) ("NEPACCO"), a CERCLA case, the court

determined that if a corporation had effectively dissolved, the correct route was to follow F.R.C.P. 17(b) and state law. The court nonetheless permitted suit only because the corporation had not perfected its dissolution, in that it failed to file a certificate of voluntary dissolution with the Secretary of State. As the decision pointed out, the corporation was "not completely dead for all purposes, but merely in a 'state of coma' during which it is still subject to suit . . ." 810 F.2d at 746. That situation, of course, is not involved here. All steps required to be taken to perfect dissolution, including filing the certificate, were completed on behalf of Industrial.

There is strong support for the Eighth Circuit's decision in *NEPACCO* that F.R.C.P. 17(b), and hence state law, govern the capacity of a corporation to be sued in a CERCLA action. In a later decision, *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 631 F.Supp. 303 (N.D. Calif. 1986), *aff'd* 817 F.2d 1448 (9th Cir. 1987), both courts cited *NEPACCO*, agreeing with its use of F.R.C.P. 17(b) and state law, and also applied pertinent provisions of California state law in holding that the dissolved corporation could not be sued under CERCLA.

In *Levin*, the corporation had fully and properly dissolved in accordance with California state law. The court looked at the language and purpose of CERCLA and rejected arguments that using California state law would prevent imposition of liability. The court saw this as a mischaracterization of the law of capacity, and would not allow suit to go forward. *Accord: United States v. Moore*, 698 F.Supp. 622, 624 (E.D. Va. 1988) ("The capacity of a

corporation to sue or be sued [under CERCLA] is determined by the law of its incorporation" [citing F.R.C.P. 17(b) and NEPACCO]).

Cases which might seemingly support an express preemption argument in reality are dealing with issues other than an open and effective dissolution. In *United States v. Sharon Steel Corp.*, 681 F.Supp. 1492 (D. Utah 1987), the court did not deal in depth with the state law of dissolution and capacity issues. The court merely opined that CERCLA preempted F.R.C.P. 17(b) and state law on the subject of corporate capacity to be sued. The court rejected contrary authority, and did not address the proposition that F.R.C.P. 17(b) is actually a codification of federal substantive law.

But that case, on further reading, is consistent with other decisions. The dissolution laws and capacity doctrine were not fully at issue. The court in *Sharon Steel* did not have to face the preemption issue squarely because the liquidating trust for the supposedly dissolved corporation had not yet distributed all of the corporation's assets when it was sued by the government. The court stated:

Nor is the court faced with a situation in which the corporation's assets have been fully distributed and its affairs completely wound up, that is, where the corporation is not only dead but also buried. Here the funeral is still going on. Corporate assets that might be used to pay cleanup costs have not yet been distributed to shareholders. Under these facts, the court holds that CERCLA overrides the general capacity provisions of Rule 17(b) to the extent the Rule might otherwise shield a dissolved corporation from liability.

681 F.Supp. at 1498. The court was dealing with a different issue than what is involved here, and this decision does not run afoul of decisions in other cases. Suit against the corporation in *Sharon Steel* was permitted because the dissolution had not been perfected. In looking *not* at the *Sharon Steel* court's extremely brief discussion of the capacity issue, but at the holding and actual circumstances surrounding the case, it is consistent with NEPACCO, which applied Rule 17(b) in a CERCLA context. Both courts did not allow corporations that had supposedly dissolved but had not yet completed or perfected the dissolution proceedings to avoid suit.

In *Allied Corp. v. Acme Solvents Reclaiming Inc.*, No. 86-C-20377, slip op. (N.D. Ill. July 6, 1990), relied upon by petitioner, the court agreed with *Sharon Steel*, but took an even briefer survey of the law on this issue. The Court makes no mention of contrary authority (such as *Levin Metals* and *Moore*), in fact citing NEPACCO solely for the proposition that CERCLA is intended to be both remedial and retroactive, making no mention of the fact that it holds that F.R.C.P. 17(b) and state law govern the capacity of a corporation to be sued under CERCLA. But beyond those infirmities, in *Allied* there is no evidence that the dissolution was done openly and that all parties were notified. It appears that the court was eyeing the situation as one where the corporation would "merely dissolve itself and distribute its assets prior to the filing of a CERCLA action in order to completely absolve itself of any liability under the statute". (Petitioner's Appendix at A-54-55). In that case, there also appeared to be some doubt as to whether the post-dissolution survival period had run before suit was commenced.

While it may be true that F.R.C.P. 17(b) and state law should not be used as a tool or subterfuge to avoid CERCLA liability, there is no question that that was not the case here. Industrial followed all applicable laws in effecting its dissolution. In the circumstances of this case, there was certainly nothing improper about Industrial's decision to dissolve and the handling of its dissolution. Industrial had ceased doing business and undertook liquidation of its assets during the years before it actually formally dissolved. Industrial's dissolution was accomplished openly, and it repeatedly disclosed its dissolution to both the EPA and the MPCA. There is no finding that Industrial was improperly using the dissolution procedures solely as a means to avoid liability under CERCLA. Neither petitioner, nor for that matter any of its companion companies nor the state or federal governments, took the opportunity to sue Industrial during the three-year period of limitations, when Industrial never made any attempt to conceal the fact that it had liquidated and dissolved. Instead, petitioner waited another two years before acting.

Improper motive was also the concern in another case relied upon by petitioner involving personal liability under CERCLA. In *United States v. Mottolo*, 695 F.Supp. 615 (D. N.H. 1988), the court was trying to prevent an individual from wrongfully escaping liability. The defendant belatedly incorporated and then tried to use the limited liability provisions of corporate law to escape a potential preexisting CERCLA liability. The defendant admitted that he incorporated to escape that very liability, and the court found that the corporation was not viable even under the common law alter ego doctrine.

The court would not allow the defendant to use the corporate entity as an untimely created shield to escape liability. This case is thus facially distinguishable from the case at hand.

The cases relied upon by petitioner do not pose a real and direct conflict between CERCLA and the role of F.R.C.P. 17(b) and state law of corporate capacity to be sued. All of the courts permitted suit only when the dissolution was not perfected or where there was a blatantly improper purpose.

B. The True Issue In This Case Involves Failure To Act Within A Liberal And Known Time Frame Provided For Suit Following Corporate Dissolution.

Even if the Court were interested in doing so, this case is not an appropriate vehicle for revisiting the roles of F.R.C.P. 17(b) and state law of corporate capacity, since that is not the real issue here. Rather, the issue here is, why didn't petitioner or someone else sue Industrial within the liberal three-year survival period following dissolution? Industrial's dissolution was accomplished openly, and the three-year survival period was available within which to bring suit. Industrial made no secret of its dissolution; indeed, by repeated correspondence early in the survival period, the trustee in dissolution specifically notified both the MPCA and the EPA of the true facts. It is undisputed that no claim or suit was brought against Industrial until petitioner commenced this action on October 28, 1988, precisely five years after the certificate of voluntary dissolution was publicly filed with the Minnesota Secretary of State, and two years after the

statute permitting suit to be brought against dissolved corporations had expired. Why is there any conflict between the federal policies underlying CERCLA and the federal law of corporate capacity to be sued, when any party entitled to seek relief had ample time to sue within the permissible time period?

If a party chooses to sit on its rights for years, as petitioner did, it has no one to blame but itself, and there is no necessity for this Court to revisit generations of precedent on the issue of legal capacity to be sued simply because a plaintiff has failed to act timely. Industrial's dissolution occurred publicly and openly, and was repeatedly communicated to the authorities. There is no excuse for anyone having failed to act. Had petitioner relied and timely acted on knowledge of the dissolution, this issue would never have arisen.

C. Respondent's Reason For Dissolution, And The Circumstances And Timing Thereof, Provide No Support For Preemption.

The Eighth Circuit decision in this case, contrary to petitioner's hyperbolic mischaracterization, does not create a "blueprint for corporations" to avoid potential liability for the cost of hazardous waste clean-up. The court may well have been faced with a different situation had there been any evidence of improper motive or any substantiated fear that the decision would be used as an improper weapon, as in *Allied Corporation* and *Mottolo*. But the court affirmed the district court's determination that there was no reason that Rule 17(b) not be applied to CERCLA actions, even if liability was defeated as a result.

In a diversion from the real issue, petitioner unwarrantedly attacks Industrial's motive for dissolving when it did (Pet. at 23-24). There is no evidence to support such an accusation, and the same groundless argument failed to influence the courts below. The point is that the facts of complete, effective dissolution and petitioner's inexplicable failure to act are all that is of controlling importance. Even so, Industrial ceased actively doing business in 1979. It had no customers nor employees at that time, and began liquidating its assets and vacating its plant. That it commenced formal dissolution proceedings later is not unusual. To ascribe a bad motive to this is, once again, nothing more than a transparent attempt to deflect attention from the determinative issue: why didn't anyone step in during the liberal three-year survival period and timely sue, when Industrial never made any attempt to conceal the fact that it liquidated and dissolved?

In addition, while it is true that Industrial immediately commenced suit against its insurance carriers when the carriers denied coverage of any claim relating to the landfill, the insurance coverage suit was commenced in 1984 when the MPCA stated in writing that it felt that Industrial might be a potentially responsible party with respect to the landfill. All of these events occurred *after* Industrial had dissolved, but *during* the three-year statutory extension period, when it was surely prudent to establish coverage. After all, Industrial was capable of being sued at any time up to October 28, 1986.

Similarly, petitioner's argument about threats to the future of hazardous waste cleanup efforts also misses the mark. Petitioner wants the Court to believe that the application of corporate dissolution statutes diverts and delays

the cleanup process. But corporate dissolution statutes simply establish a time frame within which to act, a time frame fully and openly available and presumably understood in this situation. Petitioner could have sued Industrial for contribution at any time between 1983 and 1986 while expenditures for investigation and analysis were being incurred. Admittedly, such a suit would have been timely commenced. Moreover, Petitioner in fact sued for contribution long before the cleanup issues were fully resolved (they apparently are not yet fully resolved today), casting serious doubt on its argument that earlier commencement of suit would "frustrate" the typical process followed in CERCLA cases.

Petitioner bases its threat on a situation "where a major contributor seeks to use state dissolution law to avoid liability" (Pet. at 28). But there is no question that this is not an issue here. Fraud or bad faith would throw a completely different light on the situation, as it did in the *Mottolo* case. The Eighth Circuit merely allows a corporation to openly go through the dissolution process and end its existence, as has been allowed historically. There is no reason to prevent this ordinary occurrence, even weighing in the impact of CERCLA, when the avenues available to include Industrial were overlooked.

CONCLUSION

The remedy and explanation for petitioner's position lies with Congress and in its own failure to act vigilantly to protect its rights. For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 17 day of October, 1990.

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